* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO (OS) NO. 418/2002**

Reserved on : February 18, 2009

Date of Decision : April 23, 2009

M/s. GIVO Ltd. .....Appellant

Through: Ms. Ravi Birbal, Advocate.

Versus

Mr. David Johnson .....Respondent

Through: Mr. J.M. Bari, Advocate.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? NO

2. To be referred to the Reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES

JUDGMENT

: MUKUL MUDGAL,J.

1. This appeal by the employer arises from the judgment of the learned Single

Judge dated 25th October, 2002. By the impugned judgment, the learned Single Judge dealt with the objections to an arbitral award dated 11th January, 2000 preferred by the respondent herein who was an employee of the appellant.

2. The facts of the case have been summarized by the learned Single Judge in the following words: -

"2. The background of facts, to the extent necessary for appreciating the challenge to the arbitral award, is that the petitioner joined the employment of the respondent, in the capacity of "Chief Modalist", drawing in those times, a fairly huge salary of Rs.37,216/- per month.

3. The petitioner's case is that he was illegally suspended w.e.f. 18.12.96, and then illegally dismissed from service w.e.f. 31.8.98 and that he was not paid his salary from December 1996 onwards, despite repeated demands.

4. The respondent had preferred a counter claim on the ground of breach of non-completion of agreed tenure of service as stipulated by the agreement of training dated 25.10.94, pursuant to which, the respondent claims, that the petitioner was obliged to serve for a minimum period of 7 years, failing which he had agreed to compensate the respondent, by way of liquidated damages at Rs.1 lakh per year of the balance period not served/less-served.

5. The Ld. Arbitrator, in his award dated 11.2.2000, came to a categorical finding that the disciplinary enquiry conducted by the respondent against the petitioner, was vitiated by illegality. The learned Arbitrator also held that the termination order dated 31.8.98, being based upon the illegal enquiry, is also illegal. It was further held that the petitioner is entitled to his salary w.e.f. December, 1996.

6. While all these findings were rendered in favour of the petitioner, however the petitioner is aggrieved of part of the findings of the Ld. Arbitrator, holding that the petitioner would not be entitled to the conveyance allowance and entertainment allowance for this period. The petitioner is also aggrieved of the direction/finding of the arbitrator, by which he has assumed a termination, and/or through the award, terminated the services of the petitioner, by simply ordering payment of three months' salary in petitioner's favour, and that too retrospectively for the period from September to November 1998.

7. The petitioner is also aggrieved of another finding returned to the effect that the respondent is entitled to receive Rs.4 lakhs as compensation/damages for balance period of four years, less served out

of the total agreed period of 7 years.

8. The respondent has not filed any objections against the award, and therefore cannot claim to be aggrieved of any of the findings of the award."

3. The learned Single Judge held that: -

a. A part of the Award can be set aside as it was contrary to the doctrine of public policy.

b. The disentitlement of conveyance and entertainment allowance for the duration of the illegal enquiry and then duration of illegal inspection are contrary to the public policy of India in view of the judgment of the Supreme Court in ***Hotel Imperial, New Delhi and Ors. vs. Hotel Workers Union*** ***Labour Law Journal 1959 (2) 544.***

c. The notice not having been given /served by the respondent for the purposes of termination of the appellant's service, the operation of the award based upon the assumed date of notice was set aside and consequently, up to the date of the award, the respondent was held entitled to full emoluments and thereafter the respondent was also entitled to the legal remedies to claim salary for the subsequent period by appropriate proceedings and the appellant could take such action as available to a management.

4. After holding that to the extent of the counter claim, the award in favour of the appellant was contrary to the public policy of India and severable and the respondent

would be entitled to raise his claim for damages, the learned Single Judge gave the following findings: -

"18. In view of the above, the award is made a Rule of this Court, to the extent of the findings holding that the disciplinary enquiry against the petitioner was vitiated, and the termination order was illegal on that account. The relief of full emoluments for the period December, 1996 onwards will however operate only upto the date of the award. For the subsequent period, the petitioner has to avail his legal remedies in accordance with law. The counter-claim awarded in favour of the respondent as well as the findings against the petitioner, holding that the conveyance allowance and entertainment allowance, being no payable, as well as of deemed termination by petitioner by assumed retrospective notice in October, 1998, is treated as severable findings of the arbitrator which are liable to be set aside.

19. Since the payment due to the petitioner, being Rs.2.77 lakhs under the award, as had been passed (and now an ever larger amount, in terms of these orders passed today, is lying held-up, the petitioner will be entitled to interest at 15% thereupon from the date the amounts fell due, and upto the date on which the total dues are actually paid by the respondent to the petitioner."

5. The above judgment of the learned Single Judge is challenged by the appellant *inter alia* on the following grounds: -

a. That the respondent was suspended on 18th December, 1996 and dismissed on 31st August, 1998 and was paid suspension allowance during the pendency of the entire proceedings.

b. The respondent did not attend the enquiry proceedings even though afforded a number of opportunities.

c. The Arbitrator granted the respondent full salary from December, 1996 till August, 1998 i.e. for the entire period when the respondent was under suspension and further

granted him pay for three months' notice period, as per the agreement entered into between the appellant and the respondent. This amount was Rs.6,17,184/-. Since the respondent had not served four years of the contracted period, a set off of Rs.4,00,000/- was granted to the appellant. A further amount for House Rent Allowance (HRA) which the appellant had to pay for leased accommodation in occupation of the company was also permitted. The respondent was awarded a sum of Rs.2,17,184/- by the Arbitrator. A Sum of Rs.2,50,000/- already stood paid to the respondent by virtue of an order of this Court.

d. It was admitted by the respondent that he was not a workman before the Arbitrator as evident from page 62 of the arbitral award. The respondent had also admitted that he should be paid the amount only up to the date of termination as is evident from page 67 of the award. The respondent, not being a workman, could not therefore, enforce the contract of personal service and thus, could not claim reinstatement and back wages available to a workman under the Industrial Disputes Act. Reliance has been placed on the following two judgments of the Hon'ble Supreme Court in the case of ***Vaish Defence College, Shyamli & Ors. vs. Laxminarain & Ors. 1976 AIR SC 888*** and ***Dr. S.B.Dutt vs. University of Delhi 1959 SCR 1236*** wherein the Court held as under: -

"In our view, all that is necessary for an award to disclose an error on the face of it is that it must contain, either in itself or in some paper intended to be incorporated in it, some legal proposition which on the face of it and without more, can be said to be erroneous. This was the decision of the Judicial Committee in the Champsey Bhara and Co. case ([1923] L.R. 50 I.A. 324). As the award in this case directs specific enforcement of a contract of personal service, it in valves a legal proposition which is clearly erroneous.

All considerations that apply to an award under the Industrial Disputes Act, cannot be said to apply to an award made under the Arbitration Act.

As, however, the appeal must be dismissed for the reason that the award contains an error on the face of it, as we have earlier found, it becomes unnecessary to decide the point raised by the respondent. We, therefore, do not express any opinion on this question."

6. The appellant also relied upon the following passages of the Arbitrator's award wherein it was held as under: -

> "There are certain complaints on record duly received by the employee before the above shortcomings were pointed out to him and in some of explanations he had admitted his omission. In view of all this it is evident that enquiry in regard to above may not be necessary and termination order dated 31.8.1998 may logically be treated under clause 5 of the agreement of training……."
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> It has been further held that:
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> "This clause 5 gives the power and authority to the company to cease the service at any time with three months notice. It comes to logical conclusion that if the company decided to cease his services w.e.f. 31.8.1998 that could only be after three months notice as the case cannot be covered under clause 4 as the proceedings of the enquiry has been struck down. The requirement of notice can be waived by paying three months notice period."

7. It was also contended by Ms. Ravi Birbal that the respondent immediately joined

NIFT and thus, it was not possible to reinstate and give him three months notice. It is submitted that this factor has been totally ignored by the learned Single Judge.

8. Before going into the merits of the present appeal, we deem it necessary to reiterate the agreement between the appellant and the respondent dated 25th October, 1994 whereupon amongst the other condition, it was specifically agreed that: -

"(3) The employee shall on his return to India after completion of training abroad join his duties in the company immediately and serve the company for a minimum period of 7 years from the date of resumption of his duties in India. During the said period the employee shall not seek employment or enter into employment with any other employer, or actively, engage or be employed in any other business or similar business as at that of the company. The failure of the employee to serve the company as aforesaid shall be a breach of this agreement with all its legal consequences.

"(4)" That if at any time during his employment, the said employee is found guilty of misconduct or any willful neglect of work or dereliction of the duties and/or non-compliance of the instructions given to him from time to time by the company, the company, without any notice put an end to his services and the employee shall therefore, continue to be liable for all losses/damages to the company."

(5) The Company shall not ordinary terminate the services of the employee during the continuance of the agreed tenure of seven years except for the reasons mentioned in clause 4 above but when it becomes necessary to dispense with the service of the employee the company shall give three months notice and the company shall further be entitled to claim the refund of the amount which it has spent on his travel and training.

(6) The employee shall be liable to pay the company as and by way of compensation refund of the assessed expenses during training period a sum of Rs.7, 00,000/- (Rupees Seven Lacs only) if the employee fails to complete period of the training or leaver the service of the company before completing the service period referred to herein above or brings about the situation by misconduct compelling the company to terminate his service. Each employee is considered as a integral member of the team responsible for execution of the project. The sum of Rs.7,00,000/- being damages caused to the company in the event of employees non-involvement in the project represents a fraction of

anticipated loss. Even then, it is mutually agreed that the aforesaid sum of Rs.7,00,000/- is reasonable and acceptable which will be progressively reduced by Rs.1 lakh of each completed year of employment calculated from the date of joining after training…."

9. In our view, the learned Single Judge has failed to take into account the fact that clause 5 of the agreement clearly provided that services could be terminated any time with three months' notice. Undoubtedly, the said three months notice ought to have been given but thereafter the learned Single Judge has gone on to hold, and in our view wrongly, that it was not known whether the appellant after reinstatement would again terminate the services of the respondent. In our view, such an assumption by the learned Single Judge was not only contrary to the record as the respondent had already joined NIFT but also contrary to all cannons of equity and fair play. During the course of the employment of the respondent with the appellant, the respondent was not only granted all benefits but was also sent for an extensive training in Italy. The respondent had been imparted training abroad by the appellant and thereafter had left their services and joined another concern. In such a situation, while entertaining the objection on the ground of conveyance and entertainment allowance, the learned Single Judge has also gone on to set aside the claim of the appellant and the consequent award of the Arbitrator.

10. This had been set aside merely on the ground that it was not known whether the

appellant would, after reinstating the respondent, terminate his services or not. In our view, this finding of the learned Single Judge, besides being unrealistic and unfair totally ignores the fact that the respondent had already joined the NIFT and did not even attend the enquiry proceedings. Besides, there were protracted legal proceedings between the parties. In such a situation the facile assumption that the appellant may still continue the services of the respondent was totally unsustainable. In such a situation, there was no question of his being reinstated, by granting all pending wages and then leaving it to the appellant to consider whether he would be terminated again or not. The relations between the parties having been soured to the extent which led to the arbitration, and thereafter, a challenge to the said Arbitrator's award by the respondent, it was totally unrealistic and indeed unimaginable that the appellant would still continue the services of the said respondent. The service of the respondent, in any event, could not be reinstated or continued in view of the employment of the respondent with NIFT. Indeed it was not the respondent's case that he was prepared to leave the NIFT and join the appellant so as to face the possible termination after giving due notice.

11. The learned Single Judge has also erroneously set aside the award of the

Arbitrator in so far as it granted damage compensation for 4 years to the appellant on the ground that the respondent was in service of the appellant from January 1995 to November 1998 and the term of his service was till December 2002. In our view, the compensation in favour of the appellant could not be set aside as admittedly the respondent did not serve the appellant for this period. This was in no way dependent upon the respondent not being given 3 months' notice as admittedly the respondent had not served out the balance 4 years of the agreed term with the appellant. Significantly, the arbitrator found as follows:-

"There are also certain complaints on record duly received by the employee before the above shortcomings were pointed out to him and in some of explanation he has admitted his omissions. In view of all this it is evident that the enquiry with regard to above may not be again necessary and termination order of service dated 31.8.98 may logically be treated under Clause (5) of the Agreement of Training which lay down "The company shall not ordinarily terminate the services of the employee during the continuance of the agreed tenure of seven years except for the reasons mentioned in clause (4) above but when it becomes necessary to dispense with the services of the employee the company shall give three months notice and the company shall further be entitled to claim the refund of the amounts which it has spent on his travel and training". Reliance is placed on AIR 1999 SC page 3219 D.R.A.RM. Educational Institutions vs. Educational Appellate Tribunal, where it is held that if parse material is available to dispense with service, enquiry is not mandatory. This clause 5 gives power and authority to the company to cease the service at any time with three months notice. It comes to logical conclusion that if the company decided to cease his services w.e.f. 31.8.98 that could only be after three month notice as the case cannot be covered under clause (4) as the proceedings of the enquiry having been struck down as said above. The requirement of notice can be waived by paying pay for three months period. The employee can claim the salary of the notice period. It shall not be equitable and just if the employee is again given three months notice under clause (5) as the employee, by his subsequent conduct, in joining the same discipline with NIFT after termination from M/s. Givo Ltd. much against the service contact of 25.10.94 undertaking unilaterally not to join elsewhere in the same discipline for a period of seven years from the date of joining after training abroad."

Thus the Arbitrator held that the services of the respondent could have been terminated by giving him three months notice and

since this notice was not given three months pay in lieu of notice was ordered to be paid. The three months notice period could not be equated to the law of requisite notice under Section 25F of the Industrial Disputes Act which requires the termination letter to be accompanied by the prescribed amount as the respondent is admittedly not a workman. Accordingly the learned Single Judge, in our view, erred in setting aside the award of the Arbitrator and thereby denying the claim of the appellant towards the equivalent of four years salary to the respondent. Even otherwise the respondent's stand displays unfairness. The respondent was not a workman under the Industrial Disputes Act but was a highly paid executive. He was trained abroad at the appellant's instance and expense and yet did not complete the seven year term with the appellant by leaving to join another concern merely after three years.

12. Accordingly, we are satisfied that the learned Single Judge's judgment cannot be

sustained and the appeal is allowed and the impugned Judgment of the learned Single Judge dated 25th October 2002 is set aside.

(**MUKUL MUDGAL)**

JUDGE

(VIPIN SANGHI)

JUDGE

April , 2009

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